elsewhere."[28] In the present case, petitioner has reimbursed itself for the cut in price to some Detroit customers by charging higher prices to competing customers in the same city.

Petitioner's effort to clothe its discriminations with constitutional as well as statutory immunity rides upon the vehicle of an assumption and assertion that discrimination in good faith to meet an equally low price of a competitor cannot be restricted without destroying a basic right that is of prime importance in the competitive system of private enterprise. If successful such an effort would, of course, identify an economic philosophy of price discrimination with that liberty of contract which is referred to in the fifth amendment. There are conflicting schools of economic thought on the subject of price discrimination and on its economic function and significance. We are not seeking to have read into the Constitution an economic philosophy at variance with that of petitioner. But we are greatly concerned that petitioner's economic philosophy not become a constitutional doctrine. Regardless of the merits of the opposing schools of economic thought on the matter of price discrimination the issue should by all means be settled in the legislative field and not transferred to the field of fundamental law. That means

[28] Hearings before House Committee on Interstate and Foreign Commerce on H. R. 13305, pp. 4, 5, 63rd Cong., Second and Third Sessions (1914).

there is nothing before this Court other than a pure matter of statutory construction.

However, in repelling petitioner's attempt to rationalize good faith to meet an equally low price of a competitor into a constitutional guarantee, it is relevant to present some of the economic considerations which make it at least doubtful that price discrimination can be a normal expression of a condition of free competition. If those considerations are well founded, petitioner's argument is not entitled to recognition on the constitutional level. Petitioner's constitutional argument would move us far in the direction of a rationalization of price discrimination as being something sacrosanct and indispensable to the maintenance of a competitive system and as something embodying hard and vigorous competition which does not become ruthless or destructive until the discriminator loses his temper and replaces his subjective good faith with a specific malevolent intent. Under that rationalization competition would become a soft and flaccid affair because it lacks the stimulus of discrimination.

In the *Cement Institute* case the Federal Trade Commission found without challenge that in an actively competitive market "there is a well-recognized principle of economics that in the sale of units of equal desirability the seller will not accept less from one buyer than from another."[29]

[29] 37 F. T. C. Decisions 87, 250–251.

That economic principle was accepted by the expert economic witnesses on both sides of the case. They differed only in the way they sought to apply it to the facts presented. Economic writers recognize this principle.[30]

Nor have the Federal courts been altogether oblivious to this economic principle. In *Corn Products Refining Co.* v. *Federal Trade Commission*,[31] the United States Court of Appeals for the Seventh Circuit unanimously stated it as follows:

> Systematic price discrimination is irreconcilable with free, active competition. It is not the kind of price competition found in a truly competitive market.

To a similar effect was the dissenting opinion of Judge Hamilton of the United States Court of Appeals for the Sixth Circuit when he said in the *Goodyear* case:[32]

> Monopolistic prices are always possible when a seller is able to deal differently

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[30] For a discussion of the principle that "there can be no discrimination without some monopoly," see A. T. Hadley, *Transportation*, pp. 101, 108; Frank Taussig, *Principles of Economics*, vol. 1, p. 204 and *Some Aspects of the Tariff Question*, p. 208; Jacob Viner, *Dumping*, pp. 1–3, 94–95; Frank A. Fetter, *Masquerade of Monopoly*, pp. 300, 411, 417; and Vernor A. Mund, *Prices Under Competition and Monopoly*, Quarterly Journal of Economics, Vol. XLIX (1934), pp. 288–303. Also Joan Robinson, *The Economics of Imperfect Competition*, p. 179.

[31] 144 F. 2d 211, 215 (1945).

[32] Dissenting opinion of Judge Hamilton, *The Goodyear Tire & Rubber Co.* v. *F. T. C.*, 144 F. 2d 620, 627 (C. A. 6th, 1939).

with the same classes of buyers of the same product or to manage in some other way to sell his goods in virtually separate markets. Recognizing this practice and in order to suppress monopolies at their inception, the Congress penalized sales of the same article to different customers at different prices.

In closing this discussion of petitioner's constitutional contentions, we assert that to accept them would give constitutional sanction, under the circumstances here present and which are of frequent occurrence, to discrimination which injures and destroys competition or which tends to create monopoly. Whatever the statute actually is and whatever Congress intended it to mean under the principles of statutory construction, petitioner insists that it cannot mean what the Court below and the Commission have held it to mean without contravening the Constitution. Petitioner rests that contention upon a fallacious and non-existent economic relationship by the maintenance of the competitive system of free private enterprise and maintenance of a freedom to discriminate in price, which the statute regards as destructive of that system. The effect of adopting the contention would be to make petitioner's economic philosophy a part of the Constitution. Rejecting it would simply recognize the constitutional right of Congress to deal with discrimination and the competitive devastation which so frequently

characterizes it in the light of legislative and administrative experience and discretion.

III

PARAGRAPH 6 OF THE COMMISSION'S ORDER IS NECESSARY AND APPROPRIATE FOR EFFECTIVE RELIEF AGAINST PETITIONER'S UNLAWFUL DISCRIMINATIONS

Paragraph 6 of the Commission's order (R. 5256) was modified by the Court below (R. 5305–10), as indicated in italics, to read as follows:

> 6. By selling such gasoline to any jobber or wholesaler at a price lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with the retailer-customers of such jobbers or wholesalers, where such jobber or wholesaler, *to the knowledge of the respondent or under such circumstances as are reasonably calculated to impute knowledge to the respondent,* resells such gasoline *or intends to resell the same* to any of its said retailer-customers at less than respondent's posted tank-wagon price or directly or indirectly grants to any such retailer-customer any discounts, rebates, allowances, services, or facilities having the net effect of a reduction in price to the retailer.

The petitioner contends that this paragraph (a) will require the establishment of price maintenance programs, (b) will jeopardize the business of independent wholesalers functioning as merchandisers, and (c) will entail basic alterations of marketing procedures, which should not

be required without previous review and consideration of this Court.

Petitioner sells its Red Crown Gasoline at tank-car prices to Citrin, Stikeman and Wayne who resell a substantial portion thereof at wholesale to a number of retail gasoline service stations in the Detroit Area. The price allowed by petitioner to these wholesalers is 1½¢ a gallon less than petitioner's posted tank wagon price which petitioner grants to its 358 retailer-customers, under contract and lease as hereinabove described, who purchase directly from petitioner in the Detroit Area. The price at which these wholesalers resell to their retailer-customers is normally the posted tank-wagon price of the petitioner. Thus the petitioner's 358 retailer-customers are engaged in competition with the retailer-customers of these three wholesalers.

The petitioner's 358 retailer-customers are prevented either by the terms of their leases or their contracts with petitioner from purchasing from wholesalers and petitioner does not permit them to purchase in tank car quantities at tank car prices. There is, therefore, no real competition between petitioner and Citrin, Stikeman and Wayne, the above named wholesalers.

It is undisputed that a differential of 1½¢ a gallon is sufficient to enable wholesalers buying in tank-car quantities to resell at a profit to their retailer customers, or to some of them, at prices lower than petitioner's posted tank-wagon price.

Citrin, for instance, sold a million gallons of petitioner's gasoline to Langer and Cohn, operating five retail service stations in the Detroit Area, at one cent a gallon less than petitioner's posted tank-wagon price.

In their wholesale operations in the Detroit Area, Citrin, Stikeman and Wayne are not engaged in competition with gasoline retailers, but this does not mean that petitioner's practice of charging them a lower price for the gasoline they resell at wholesale than it charges its customers in the Detroit Area who resell at retail may not be a violation of Section 2 (a) of the Clayton Act, as amended.

If petitioner sells to wholesalers in tank-car quantities at 1½¢ or more a gallon below the price it charges retailers in the same territory, and if a wholesaler then passes along a part of his wholesale margin to his retailer customers, selling to them below the tank-wagon price which petitioner charges retailer customers purchasing directly from petitioner, the resulting competitive advantage and injury would be the same as if petitioner sold directly to some of its retailer customers at discriminatory prices. The competitive advantage thus obtained by the retailer customers who purchase from the dealers favored by the petitioner results directly from the lower price allowed by petitioner to the favored dealers, and violates Section 2 of the Clayton Act, as

amended, even though the competition affected is competition with the retailer customers of the favored dealers and not with the favored dealers themselves.

Section 2 (a) of the Clayton Act prohibits discriminations in price in interstate commerce between purchasers of goods of like grade and quality, sold for resale, where the effect of such discrimination may be "to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." The Commission has found that the effect of the petitioner's discrimination in price to Citrin, Stikeman, and Wayne has been, and may be, to injure, destroy, and prevent competition with the respective customers of said wholesalers in the resale of gasoline. Upon the state of facts hereinbefore outlined, this finding cannot be challenged, and petitioner does not challenge it. Neither does petitioner deny that under these circumstances, its discrimination in price between wholesalers and retailers in the same sales area violates Section 2 (a). Apparently, petitioner's objections to Paragraph 6 go only to the terms of that paragraph.

The Commission's order in this case would be incomplete and possibly ineffective if it only prohibited petitioner from discriminating in price between competing retailers. The prohibition should necessarily extend to the selling of gaso-

line to any wholesaler in the Detroit Area who resells it to retailers at less than petitioner's posted tank-wagon price or who directly or indirectly grants to his retailer-customers any discounts, rebates, allowances, services, or facilities having the net effect of a reduction in price to the retailer.

There is nothing startling about prohibiting a supplier from selling to wholesalers and retailers in the same sales area at a differential so great as to enable the wholesalers to undersell their supplier, where the retailer customers of the supplier cannot buy from wholesalers but are in direct competition with the wholesaler's customers. If the supplier and its wholesalers were in fact competitors it would not be good business for a supplier whose principal distribution is direct to retailers to sell to wholesalers at a price which would enable the wholesalers to take away the retailer customers of the supplier. In this case it has been demonstrated that there is and can be no real competition between petitioner and its wholesalers.

If the prohibition contained in Paragraph 6 were not included in this order there would be nothing to prevent Ned's, solely a retailer, from transferring its business to Citrin and purchasing Red Crown gasoline from Citrin at 1¢ a gallon below the tank-wagon price, delivered at Ned's stations. Ned's would obtain substantially the

same competitive advantage over other retailers which it now obtains by purchasing in tank-car quantities from petitioner. Petitioner would achieve the same result which it now obtains, merely using Citrin as a conduit for sales to Ned's.

Petitioner contends that it has no control over the price at which its favored dealers resell the gasoline purchased by them, and that it should not be required to police sales of its customers. The answer is that, if petitioner cannot sell to both tank-car resellers and tank-wagon resellers in the same territory at different prices without injuring competition with the tank-car resellers or with their customers, petitioner should abandon the practice of selling to both of these classes of customers in the same marketing area.

As a practical matter, an order such as provided in Paragraph 6 will not prevent petitioner from continuing to sell to Detroit wholesalers in tank-car quantities at tank-car prices. If petitioner notifies its three wholesaler customers that it will refuse to sell to them if they resell to retailers at less than the posted tank-wagon price, as petitioner may lawfully do, there can be little doubt that these wholesalers will comply. *United States* v. *Colgate & Company;*[33] *Cudahy Packing Co.* v. *Frey & Son, Inc.*[34]

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[33] 250 U. S. 300 (1919).

[34] 216 F. 65 (C. A. 4, 1919), 256 U. S. 208 (1921).

And, regardless of what the favored wholesalers' reaction to such a requirement might be, petitioner having chosen to engage in the dual method of operation in the Detroit Area must accept the responsibility and burden of seeing that the difference in the prices charged to its two classes of customers does not result in competitive injury. If it cannot do this, then it has the alternative of adopting the course, followed by several of its competitors, of distributing its products in a single marketing area either through wholesalers or directly to retailers, but not by both methods.

As stated by the Court below:

> This paragraph [6] is intended to eliminate the effects of the discriminatory price made to these customers, Citrin, Wayne and Stikeman, who do a wholesale business. To avoid the force of this paragraph, the petitioner may do one of two things. First, discontinue selling to wholesalers at a price different than that made to retailers. The petitioner's three largest competitors in Detroit have found it agreeable to do so. The petitioner argues that this is an elimination of wholesalers. If this be true, it is elimination only where their existence cannot be justified by any cost savings to obtain that price. This does not impress us as either illegal, unwarranted, or unjust.

Secondly, the petitioner may under the right to choose its customers refuse to sell to wholesalers who sell to retailers below the price the petitioner makes its own retailers. The petitioner does not have to make price-control agreements with anyone. It has only to govern its own conduct to avoid the impact of an unlawful discrimination. To govern its conduct, the order makes the petitioner deal with its wholesalers at its peril as to what they might do with the gasoline in the future. The petitioner has no control and can have no control over the price of the gasoline after it is sold to the wholesalers. The latter may put any price on it they choose. They may give it away if they like. The petitioner should not be required to police its wholesalers and to sell to them at the petitioner's peril. The petitioner should be liable if it sells to a wholesaler it knows or ought to have known is engaging in or intends to engage in the competitive practices condemned by this proceeding. Under the order as drawn, the petitioner would be liable if afterwards the wholesaler should resell at a price lower than the petitioner charged its retailers. If the petitioner is to be hailed into court for a violation of the Commissioner's order, the petitioner must be guilty of knowingly choosing a customer who is using or intends to use its price advantage to undersell the petitioner in its prices made to its retailers.

IV

PETITIONER'S DISCRIMINATIONS IN PRICE AGAINST WHICH THE COMMISSION'S ORDER IS DIRECTED WERE DISCRIMINATIONS IN THE COURSE OF COMMERCE AMONG THE SEVERAL STATES UNDER SECTION 2 (a) OF THE CLAYTON ACT, AS AMENDED

The record discloses that petitioner was engaged in the business of refining, distributing, and selling gasoline to retail dealers for resale to the public in fourteen States, including the State of Michigan. The greater portion of the gasoline sold by petitioner to its customers in the Detroit area was supplied to the operators of 150 independently owned gasoline service stations in accordance with their contracts with petitioner, was supplied to meet the requirements of the lessees of 208 gasoline service stations leased to them by petitioner, and was supplied to meet the requirements of the four favored dealers. This gasoline was made from crude oil produced in the States of Kansas, Oklahoma, Texas, and Wyoming, was transported from the oil fields to petitioner's refinery at Whiting, in the State of Indiana, and after being refined was transported by tankers through the Great Lakes to the State of Michigan where it was temporarily placed in storage tanks and then transported by petitioner to these specific customers in the Detroit area of that State.

Petitioner's gasoline was thus transported in interstate commerce with the intention on the

part of petitioner and these specific customers, in advance of transportation, that such gasoline would be delivered to these specific customers. The retail gasoline service stations under contract and lease and the stations operated by the four favored dealers were the intended final destinations of the greater portion of this gasoline. The temporary storage of the gasoline at petitioner's River Rouge Marine Terminal and at the six bulk plants in the Detroit area was merely a convenient intermediate step in the process of transporting the gasoline to its final destination since it obviously would not have been convenient to deliver this gasoline to these specific customers from the tankers which transported it through the Great Lakes.

All of petitioner's gasoline sales to its customers in the Detroit area are transactions between residents of different states and require for their consummation the interstate shipment of the gasoline. These customers form a stable group and their orders are recurrent as to the kind and amount of gasoline. Throughout the period of time involved in this proceeding, the requirements of these specific customers were constant and continuous and by means of its office records and close intimate contact with the operators of the gasoline service stations, petitioner could and did estimate with precision the requirements of these specific customers.

Petitioner's Detroit office is merely the agency through which it engages in the wholesale marketing of gasoline in that area of the State of Michigan. Delivery of the gasoline is entirely in the hands of the petitioner and title to the gasoline does not pass from petitioner to its customers until delivery to them is made at their retail gasoline service stations in the Detroit area. The sales, as well as the transportation, are in and a part of interstate commerce. Each is interdependent upon the other. The petitioner's storage tanks are merely the "throat" through which the "current of commerce" flowed from petitioner to the aforesaid specific retailer customers in the State of Michigan.

Thus, there is a practical continuity of movement of the petitioner's gasoline flowing through the Indiana refinery to petitioner's customers in Detroit, with no intermediate sales and with only such temporary physical interruptions to the flow as petitioner finds convenient for its own internal purposes as a corporation which distributes and sells its gasoline in fourteen states.

Petitioner contends that the decision of the lower Court holding that the sales involved in this proceeding were in interstate commerce within the intent and meaning of the Clayton Act, as amended, was: (1) in conflict with this Court's reasoning in *Walling* v. *Jacksonville Paper Co.*;[35]

[35] 317 U. S. 564 (1943).

(2) in conflict with the decisions in: *Lipson* v. *Socony-Vacuum Corp.*;[36] *Domenech* v. *Pan American Standard Brands, Inc.*;[37] *Jewel Tea Co.* v. *Williams*;[38] and that (3) the lower Court failed to distinguish between the line of cases involving sales "in commerce" and those involving sales "affecting commerce" (br. pp. 6–7). The first contention completely ignores the language used by this Court in the *Jacksonville* case; the second is wholly beside the point;[39] and, since the evidence placed the sales here involved "in commerce" there was no reason, need, or occasion for the lower Court to differentiate between the "in commerce" and the "affecting commerce" line of cases, the third is immaterial.

The decision of the lower Court in the instant case was squarely in line with the reasoning of this Court in the *Jacksonville* case holding that a break in the continuity of transit at a warehouse is not controlling if there is "a practical con-

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[36] 87 F. 2d 265 (C. A. 1, 1937) cert. granted 300 U. S. 651, dism. per stip. 301 U. S. 711.

[37] 147 F. 2d 994 (C. A. 1, 1945).

[38] 118 F. 2d 202 (C. A. 10, 1941).

[39] The *Lipson* cases were actions at law to recover treble damages and were decided on a demurrer to an amended declaration, the Court holding that the amended declaration failed to allege concisely and with substantial certainty, as required under the applicable laws of Massachusetts, any cause of action either as to interstate commerce or as to injury to competition. The facts in the *Domenech* case and the *Jewel* case clearly distinguish them from the instant case.

MOTION FILED JUL 22 1949

IN THE

Supreme Court of the United States

October Term, 1948

No. 107

STANDARD OIL COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

APPLICATION FOR LEAVE TO FILE BRIEF, AND BRIEF, ON BEHALF OF RETAIL GASOLINE DEALERS ASSOCIATION OF MICHIGAN, INC., AS *AMICUS CURIAE*, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

October Term, 1948

No. 851

STANDARD OIL COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

APPLICATION FOR LEAVE TO FILE BRIEF ON BEHALF OF RETAIL GASOLINE DEALERS ASSOCIATION OF MICHIGAN, INC., AS *AMICUS CURIAE*, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your applicant, Retail Gasoline Dealers Association of Michigan, Inc., respectfully makes application to this Court for leave to file the accompanying brief, as *amicus curiae*, in opposition to the petition for writ of certiorari filed herein by the petitioner, Standard Oil Company.

Your applicant is a Michigan non-profit membership corporation serving the interests of the retail gasoline dealers of that State. The Association has more than 2,000 members in the State of Michigan, and more than 1,450 members in the Detroit Metropolitan Area. Its Detroit membership is fairly representative of all the retail gasoline dealers of that area.

The retail gasoline dealers of Detroit have a direct and vital interest in the outcome of this proceeding. They are the principal beneficiaries of the order of the Federal Trade Commission which is the subject of the proceeding, and are the persons who would be most directly affected if that order should be set aside.

The Commission's complaint herein charged, and the Commission found upon the evidence, that petitioner has discriminated in price in the sale of its gasoline in the Detroit Metropolitan area by selling such gasoline to four dealers, classified as jobbers but who resell in whole or in part at retail, at prices substantially lower than the price which petitioner charges for the same gasoline to the 350 to 400 other retail dealers whom it supplies in Detroit. The Commission charged and found, and it was not disputed upon review in the Court of Appeals, that these price discriminations have had and may have the effect of injuring, destroying and preventing competition between the four favored dealers and the other retailers in Detroit who are forced to purchase their gasoline from petitioner at higher prices. The Commission's order, and the decree of the

Court of Appeals which this Court is now asked to review, prohibit those discriminations in price. Said order and decree have for their direct purpose and primary effect the protection of the retail gasoline dealers of Detroit from injurious and ruinous competition engendered by petitioner's said discriminations. The retail gasoline dealers of Detroit, therefore, have a direct and legitimate interest in the said order and decree which are the subject of the present petition for certiorari.

Your applicant, through the undersigned as its attorney, has participated in this case in its previous stages before the Federal Trade Commission and the United States Court of Appeals for the Seventh Circuit. In April, 1946, the undersigned appeared and presented oral argument before the Commission, on behalf of Retail Gasoline Dealers Association of Michigan, Inc., at a hearing upon motions to set aside or modify the Commission's order. Upon review the Court of Appeals permitted your applicant to file a brief as *amicus curiae* and to present oral argument in support of the Commission's order.

The purpose of the brief herewith submitted is to correct certain misstatements in the petition as to the effect of the decree below, and as to the nature and significance of the questions presented, which it is believed should be called to the attention of this Court; also to present certain pertinent facts not stated in the petition which it is believed the Court will find material in determining whether to grant certiorari.

WHEREFORE your applicant respectfully prays that it be granted leave to file the accompanying brief, as *amicus curiae*.

Respectfully submitted,

CYRUS AUSTIN,
Attorney for Retail Gasoline Dealers Association of Michigan, Inc.

WILBUR DUBERSTEIN,
Counsel.

Dated, July 18, 1949.

BRIEF ON BEHALF OF RETAIL GASOLINE DEALERS ASSOCIATION OF MICHIGAN, INC., *AMICUS CURIAE*, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. Neither the Commission's Order Nor the Decree of the Court of Appeals Has the Effect of Denying to a Seller the Right to Lower His Price to a Customer in Good Faith to Meet the Price of a Competitor.

At the outset of its petition, petitioner states that the Federal Trade Commission and the Court of Appeals have "denied a seller the right to meet competition in good faith by reducing his price to an individual customer to meet a price offered to the customer by a competitor". This characterization of the effect of the decree below is repeated throughout the petition and brief. The first reason offered by petitioner for the allowance of the writ is "the lower court's denial of the right of a supplier to reduce its prices to certain customers in good faith to meet equally low prices offered them by competitors". The claim that the Commission and the Court have so construed the Clayton Act is the principal reason relied on by petitioner for allowance of writ of certiorari.

The Commission's order does not deny to petitioner the right to lower its price to an individual customer or customers in good faith to meet an equally low price of one of its competitors. A seller's right to do that was not questioned either by the Commission or by the Court. Petitioner's true contention was, and is, that the statute permits a seller to lower his price to one customer to meet his own competition *and at the same time to charge higher and*

discriminatory prices to other competing customers, even where the discrimination is affirmatively proved to have resulted (or to be one which may result) in injury to competition with the favored customer. The question presented is not whether a seller may meet a competitor's price, but whether section 2(b) of the Clayton Act makes a showing that the seller's *lower* price was made in good faith to meet the price of his competitor an absolute justification for *discrimination* in price declared unlawful by section 2(a).

Following this Court's construction of section 2(b) in *Federal Trade Commission* v. *Staley Manufacturing Co.* (324 U. S. 746, 752), and relying on the language and history of the statute, the Court of Appeals held (173 F. (2d) 210) that the good faith meeting of a competitor's lower price, while sufficient to rebut a *prima facie* case (made by showing only discrimination without proof of effect on competition), does not constitute a substantive defense where all of the elements of violation of section 2(a) have been affirmatively proved.

There is some attempt in this petition to argue that petitioner's discrimination in price in Detroit did not result in injury to competition because petitioner's favored customers (who resold at retail in competition with some 350 other retailer customers paying a higher price) would have been able to obtain an equally low price from other suppliers. No such contention was made on review in the Court of Appeals. The Commission's findings of fact as to injury to competition were not contested. The sole question raised on this branch of the case was whether a seller's good faith meeting of competition with respect to his lower price is a complete justification for price discrimination regardless of the effect of the discrimination on competition between the seller's customers.

II. The Above Question of Statutory Construction Has Already Been Decided by This Court in the *Staley* Case, and the Decision of the Court of Appeals in This Case Is Not in Conflict With, But Follows, This Court's Decision.

Petitioner's contention is, in effect, that the Robinson-Patman Amendment to the Clayton Act in 1936 did not change the Clayton Act with respect to the effect to be given the defense of "meeting competition". Prior to 1936 section 2 of the Clayton Act contained the following proviso:

> "That nothing herein contained shall prevent * * * discrimination in price in the same or different communities made in good faith to meet competition."

The Robinson-Patman Act struck that proviso out of section 2(a) (which corresponds to old section 2), and inserted a quite different proviso in a new procedural section, section 2(b), which defines a prima facie case and provides that a seller *may rebut such prima facie case* by showing that his lower price was made in good faith to meet the equally low price of a competitor. Affirmative defenses available to a seller were retained in section 2(a), which now contains no mention of meeting competition.

Petitioner is now contending that this change in the statute was meaningless and that "meeting competition" is still an affirmative defense just as it was under the old Clayton Act.

This question has already been considered and decided by this Court in *Federal Trade Commission* v. *Staley*

Manufacturing Co., 324 U. S. 746, 752, where the Court said:

> "It will be noted that the defense that the price discriminations were made in order to meet competition, is under the statute a matter of 'rebutting' the Commission's 'prima-facie case'. Prior to the Robinson-Patman amendments §2 of the Clayton Act provided that nothing contained in it 'shall prevent' discriminations in price 'made in good faith to meet competition'. *The change in the language of this exception was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination.*" (Italics supplied.)

We read the above as clear pronouncement that under the Robinson-Patman Act "meeting competition" is no longer a substantive defense; that such proof is now sufficient to rebut only a *prima facie case* of violation of section 2(a), thus raising an issue of fact to be determined by the Commission upon the evidence in each case, as to whether the competition justified the discrimination.

In this case the Commission found upon the evidence that the competition met did not justify the discrimination, in view of the injurious effect of the discrimination upon competition between petitioner's customers, even assuming that petitioner's lower price to the favored customers was made in good faith to meet its own competition (Findings, Paragraph Thirteen, R. 5182). The factual basis for that finding was not challenged in the Court of Appeals. It would seem, therefore, that the Commission's said finding conforms to this Court's construction of the statute in the *Staley* case, and is now conclusive.

In view of the foregoing it is submitted that, with respect to the effect to be given to the defense of "meeting

competition", the decision of the Court of Appeals presents no important question of federal law not heretofore settled by this Court, and is not in conflict with the prior decisions of this Court.

III. The Decision of the Court Below Presents No Question as to the Constitutionality of Sections 2(a) and 2(b) of the Clayton Act.

The petition alleges that this case presents the question "Whether Section 2 of the Clayton Act as amended, construed to deprive a supplier of this basic right, contravenes the due process clause of the Fifth Amendment".

Petitioner's contentions in this respect are based upon the false premise that the Commission and the Court of Appeals have construed sections 2(a) and 2(b) of the Clayton Act as "depriving petitioner of its right in good faith to meet the price of a competitor". As above pointed out, neither the Commission nor the Court has questioned the right of a seller to meet a competitor's price in good faith. The statute as construed in this case does not have the effect of preventing such meeting of competition.

Petitioner's real complaint is that the Court below has not construed the statute as permitting it to discriminate in price between its customers at will, regardless of the effect on competition between its customers, so long as it can show that its lower price to the favored customers was made to meet a price offered by one of its own competitors. The denial of this construction does not present a question as to the constitutionality of section 2 of the Clayton Act.

IV. Both Branches of Congress Have Recently Passed Legislation Amending Section 2(b) of the Clayton Act Which, If Enacted at This Session, Will Remove From This Case the Question of Construction of Existing Federal Law.

On June 1, 1949, the Senate passed the O'Mahoney bill, S. 1008, amending the Federal Trade Commission Act and the Clayton Act. Section 3 of the bill, as introduced, amended the proviso of section 2(b) of the Clayton Act so as to permit a seller to justify an otherwise unlawful price discrimination by showing that his lower price was made in good faith to meet the equally low price of a competitor. It was pointed out and conceded on the floor of the Senate (and again when the bill reached the House) that the purpose and effect of this amendment was to change the law as construed by the Federal Trade Commission and the Court of Appeals in this case. The Senate thereupon amended section 3 of the bill so as to provide (in section 2(b) of the Clayton Act) that such meeting of competition is not a defense where the discrimination results in substantially lessening competition. As so amended the bill was passed. The proponents of the amendment stated that its purpose was to preserve the rule in this case.

When the bill reached the House of Representatives the House Judiciary Committee struck out the Senate amendment to section 3. On the floor of the House on July 7th an amendment was again inserted, after lengthy debate, providing that meeting competition may justify price discrimination "if the discrimination is not such that its effect on competition may be that prohibited by this section". The bill passed the House with that amendment.

The result is that both the Senate and the House have rejected an attempt to overturn the decision of the Commission and the Court of Appeals in this case and have met that attempt by writing said decision into the statute, subject to conference agreement and final passage.

In view of the seeming probability that this bill will be finally passed at this session of Congress and become law, we believe that the above brief summary of its history is appropriate at this time. If it is enacted, this case will no longer present a question of construction of existing statutory law.

V. The Interstate Commerce Question Presented by This Case Is Not a Novel One, and Has Been Disposed of in Principle by This Court in Many Prior Cases.

The gasoline which petitioner sold at discriminatory prices in Detroit was shipped there via the Great Lakes from its refinery at Whiting, Indiana. The gasoline was unloaded at petitioner's marine terminal on the edge of Detroit, whence it was transported either directly to the customers' tanks or indirectly via six bulk storage plants located in various parts of the city. The same retail service stations were supplied the year around and their requirements were well known and constant subject to seasonal variations. These service stations did not buy gasoline from any other source, their entire requirements being supplied by petitioner. The same was substantially true of the four jobbers, who operated certain service stations of their own (one jobber was solely a retailer) and supplied others.

Petitioner's marine terminal on the outskirts of Detroit was merely a reservoir through which the gasoline passed

from tank steamer to tank truck, en route from refinery to customer. This reservoir was, of course, large enough to assure a continuous supply of gasoline to the service stations and other customers during the winter months when Great Lakes navigation was suspended.

This Court will recognize such a stream of interstate commerce as one which, upon analogous facts, it has had occasion to consider and has ruled upon in many previous cases. It is submitted that this branch of the case does not present a situation calling for review by this Court for any of the reasons usually assigned by the Court for granting certiorari.

Conclusion.

It is submitted that the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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